PUBLIC VERSION

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August 31, 2017

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***AT&T Corp. v. Iowa Network Services, Inc.*, Proceeding No. 17-56, File No. EB-17-MD-001**

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits for filing in the above-referenced proceeding the **Public Version** of its Motion to Strike Portions of INS's Final Reply Brief and Supporting Declarations. Consistent with the Commission's rules and the February 24, 2017, Protective Order entered by the Commission Staff, AT&T has redacted all highly confidential information from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary's office hard copies of the **Highly Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically on INS's counsel. Electronic courtesy copies, as well as three courtesy hard copies of the Highly Confidential Version, are also being provided to the Commission's Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

Michael J. Hunseder

Enclosures

SIDLEY

cc: James U. Troup, Counsel for Defendant
Tony Lee, Counsel for Defendant
Lisa Griffin, FCC
Anthony DeLaurentis, FCC
Christopher Killion, FCC

AT&T Corp.
Motion to Strike

PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of **AT&T CORP.** **One AT&T Way** **Bedminster, NJ 07921** **(303) 299-5708** ***Complainant,*** ***v.*** **IOWA NETWORK SERVICES, INC.** **d/b/a Aureon Network Services** **7760 Office Plaza Drive South** **West Des Moines, IA 50266** **(515) 830-0110** ***Defendant.***	**Proceeding Number 17-56** **File No. EB-17-MD-001**

MOTION OF AT&T CORP. TO STRIKE PORTIONS OF INS'S FINAL REPLY BRIEF AND SUPPORTING DECLARATIONS

Pursuant to 47 C.F.R. §§ 1.727 and 1.728(b), AT&T Corp. ("AT&T") respectfully submits this motion to strike portions of the Final Reply Brief and supporting declarations submitted on August 28, 2017 by Iowa Network Services, Inc. d/b/a Aureon Network Services ("INS") in the above-captioned proceeding.

INTRODUCTION

In connection with its Final Reply Brief, INS submitted two new declarations (from Frank Hilton (INS Ex. 77) and William Warinner (INS Ex. 78)), a recently produced document (INS Ex. 80), and a brand new rate analysis conducted by Mr. Warinner (attached to INS Ex. 78). Much of this information should and could have been submitted in connection with INS's Answer on June

28, 2017. And, all of it should and could have been addressed in INS's Final Brief of August 21, 2017. Despite the accelerated schedule in § 208(b)(1), and the Staff's admonitions that the scheduling deadlines were firm and critical to allow the Commission to evaluate the record, INS submitted none of this material on time.

Instead, INS waited until its Final Reply Brief and, by doing so, deprived AT&T of a full opportunity to investigate and respond to INS's belated presentation in the normal course of this proceeding. As explained below, the new arguments presented by INS's two new declarations (one from an entirely new declarant) regarding the purported reasonableness of INS's centralized equal access ("CEA") rates are not only out of time, they are riddled with problems that could have been fully investigated and addressed if the materials had been timely submitted. Accordingly, AT&T requests that the Commission strike: (a) Mr. Warinner's declaration in its entirety, (b) the portions of Mr. Hilton's declaration that relate to INS's over-allocation of Cable & Wire Facilities ("CWF") fiber costs and the dramatic change in the Access Division's network costs between 2012 and 2013, and (c) the sections of INS's Final Reply Brief that rely on Mr. Warinner's declaration and the portions of Mr. Hilton's declaration that should be stricken.[1]

BACKGROUND

In implementing the rules applicable to formal complaint proceedings, the Commission has admonished "complainants and defendants to exercise diligence in compiling and submitting full legal and factual support *in their initial filings* with the Commission." *See In the Matter of Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd. 22497, ¶ 71 (1997) ("*Report and Order*") (emphasis added). This fact-based pleading approach stands in stark contrast to the

[1] To assist the Commission in this connection, copies of those documents marking the material to be stricken are attached as Exhibits A, B and C.

typical notice pleading standard used in federal courts, and as a result, defendants are required to attach to their answer "all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer." 47 C.F.R. § 1.724(g).

As has now become apparent, INS did not adhere to these rules in submitting its Answer. Rather than respond directly and fully to the arguments raised by AT&T in its Complaint and in the declaration of Daniel P. Rhinehart regarding the derivation and reasonableness of the lease rates purportedly charged to the Access Division and used in INS's Tariff Filings, INS instead either ignored or brushed aside many of AT&T's and Mr. Rhinehart's claims. Worse yet, INS did not present declarations on these issues from the individuals who were identified in its Information Declarations as knowledgeable.[2] Instead, it submitted a declaration from Jeff Schill, its current Senior Vice President of Finance, who was not identified in INS's Information Designation as knowledgeable, and **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Additionally, INS did not produce in the ordinary course of discovery all the material on which it now seeks to rely.[3]

[[BEGIN HIGHLY CONFIDENTIAL]] [redacted]

[2] *See* INS Answer to AT&T Complaint, Information Designation, at 104-05.

[3] *See* Letter from J. Troup and T. Lee (INS Counsel) to Staff Counsel, dated Aug. 22, 2017; Letter from J. Bendernagel (AT&T Counsel) to Staff Counsel, dated Aug. 24, 2017; Letter from INS Counsel to Staff Counsel, dated Aug. 24, 2017; Letter from AT&T Counsel to Staff Counsel, dated Aug. 25, 2017.

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

Following Mr. Schill's deposition, INS did not take any steps to address the significant deficiencies in its rate presentation.[4] Instead, it doubled down on those very deficiencies. On August 16, it submitted a verified copy of its Interrogatory Responses which included Exhibit 1 to its August 7 letter. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Further, despite being given an opportunity for post-discovery briefing, INS did not address in its Final Brief the serious issues raised by AT&T

[4] AT&T's request for deposition was for INS to produce Mr. Schill, or a person with knowledge about INS's rates. *See* Joint Statement on Settlement, Discovery and Scheduling, at 22 ("AT&T requests that Mr. Schill, or an [INS] representative with knowledge of these issues, be made available for a deposition to address these matters."). Thus, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

at Mr. Schill's deposition. Instead, it simply waited until the reply phase of the briefing schedule, at which time it belatedly presented two new declarations (one from an entirely new declarant), a newly discovered document, and a new rate study.

As explained below, INS's approach is not consistent with the Commission's rules and, for that reason alone, the portions of Mr. Hilton's new declaration regarding INS's over-allocation of CWF fiber costs and the dramatic change in the Access Division's network costs between 2012 and 2013, and the entirety Mr. Warinner's declaration (including the two new exhibits on which he relies) should be stricken. In addition, the sections of INS's Final Reply Brief that rely on that material should also be stricken.

ARGUMENT

A motion to strike is warranted where a defendant's submission fails to comply with the rules applicable to formal complaint proceedings. *See, e.g.*, 47 C.F.R. § 1.728(b) (pleadings that are "not in conformity with the [formal complaint] rules . . . may be deemed defective," and the "Commission may strike the pleading …"). As previously noted, the Commission's *Report and Order* admonishes defendants to "exercise diligence in compiling and submitting full legal and factual support *in their initial filings* with the Commission." *Report and Order*, ¶ 71 (emphasis added); *see also* 47 C.F.R. § 1.724(g). INS has not met that standard.

The new information presented in INS's Final Reply Brief regarding the reasonableness of its CEA rates could have and should have been presented earlier. Both Mr. Hilton and Mr. Warinner were identified in INS's Information Designation as knowledgeable individuals who could have addressed (in INS's Answer or in its Final Brief) the issues belatedly raised in INS's Final Reply Brief. Instead, INS put forward Jeff Schill as its rate expert, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** INS did not take any immediate steps to supplement the record. Instead, INS continued to rely on Mr. Schill to verify its Interrogatory Responses and did not address in its Final Brief any of the serious problems identified at Mr. Schill's deposition.

The Commission should not permit INS to effectively sidestep the Commission's Formal Complaint rules by submitting—in the last scheduled submission—new declarations, including one from a new declarant, presenting new evidence regarding matters that could and should have been addressed earlier. Such an approach is not consistent with the Commission's rules which were designed to "expedite the resolution of all formal complaints, while safeguarding the due process interests of affected parties." *Report and Order*, ¶ 3; *see also id.* ¶ 5 (highlighting the Commission's discretion to permit alternative discovery mechanisms to ensure "full and fair resolution of disputes"). Further, as explained below, it would permit INS to put into the record without challenge evidence that is seriously flawed.[5]

A. INS's Over-Allocation of CWF Costs to the Access Division

AT&T's submissions, including declarations by Mr. Rhinehart,[6] demonstrated that INS significantly over-allocated CWF fiber costs to its Access Division.[7] While Mr. Hilton's new

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[5] *See also App. of Ameritech Mich.*, 12 FCC Rcd. 20543, ¶ 52 (1997) (in an accelerated proceeding with a statutory deadline, finding it "appropriate to accord new factual evidence [submitted on reply] no weight" because an opposing party has limited or "no opportunity to comment on the veracity of such information").

[6] *See* Rhinehart Initial Decl. ¶¶ 18-19; Rhinehart Reply Decl. ¶¶ 31-35; Rhinehart Supp. Decl. 16-32.

[7] This issue was raised at Mr. Schill's deposition. In fact, Exhibit 11 to the deposition is quite similar to the exhibit (AT&T Ex. 94) that Mr. Rhinehart presented in connection with his supplemental declaration. However, Mr. Schill was **[[BEGIN HIGHLY CONFIDENTIAL]]**

declaration purports to respond to Mr. Rhinehart's analysis, it in fact does not address it all. At no point in Mr. Hilton's declaration does he directly address Mr. Rhinehart's discussion regarding **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** In so doing, Mr. Hilton attacks a straw man and wholly mischaracterizes Mr. Rhinehart's testimony.

Contrary to INS's claim, Mr. Rhinehart did not assume that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]** *See* AT&T Ex. 87 at 132:17-136:23.

[8] **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[9] Mr. Hilton's discussion of **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[[END HIGHLY CONFIDENTIAL]]

[10] [[BEGIN HIGHLY CONFIDENTIAL]] [redacted] [[END HIGHLY CONFIDENTIAL]]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

In sum, there is no merit to Mr. Hilton's criticisms of Mr. Rhinehart's testimony regarding INS's over-allocation of CWF fiber costs to the Access Division and, for this additional reason, those aspects both of Mr. Hilton's declaration and INS's Reply Brief should be stricken.

B. **The Inability to Reconcile INS's Purported Lease Rates to Its Network Costs**

Mr. Warinner's belated attempt to respond to Mr. Rhinehart's analysis showing that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[11] Like the CWF fiber cost allocation issue, this issue was also raised at Mr. Schill's deposition. In fact, Exhibit 7 to the Schill deposition is the same exhibit on which Mr. Rhinehart relied in his supplemental declaration. But Mr. Schill was again unable to address this matter at his deposition. *See* AT&T Ex. 87 at 78:24-80:18.

[redacted]

[[END HIGHLY CONFIDENTIAL]]

C. **Cost Anomalies in INS's 2012 & 2013 Tariff Filings**

INS's belated attempt to address the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[redacted]

[12] This issue was first identified by Mr. Rhinehart in his initial declaration. *See* Rhinehart Initial Decl. ¶¶ 20-27. It was also raised in Mr. Rhinehart's Reply and Supplemental Declarations because Mr. Schill could not explain this anomaly in his declaration or at his deposition. *See* Rhinehart Reply Decl. ¶¶ 36-39; Rhinehart Supp. Decl. ¶¶ 13-14 & Table K.

[redacted] **[[END HIGHLY CONFIDENTIAL]]** *See, e.g., Great Lakes Commc'ns Corp. v. AT&T Corp.*, 2015 WL 12551192, **18-22 (N.D. Iowa, June 8, 2015).

Further, neither INS's 2012 Tariff Filing nor its 2013 Tariff Filing makes any mention of this issue in trying to explain either the 2012 decline in the CEA rate or the 2013 increase in that rate. *See* AT&T Exs. 19 and 20. Finally, neither Mr. Hilton nor Mr. Warinner has presented any documentation substantiating their claims as to the reason for the significant variation in network costs. Instead, they **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

D. **The $6 Million Error in INS's 2014 Tariff Filing**

Mr. Warinner's belated attempt to explain the **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[13] Like the 2012-13 cost anomaly, this issue was first identified by Mr. Rhinehart in his initial declaration. *See* Rhinehart Initial Decl. ¶¶ 26-27. It was also raised in Mr. Rhinehart's Reply and Supplemental Declarations because Mr. Schill could not explain this anomaly in his declaration or at his deposition. *See* Rhinehart Reply Decl. ¶ 38; Rhinehart Supp. Decl.¶¶ 13-14.

[redacted]

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

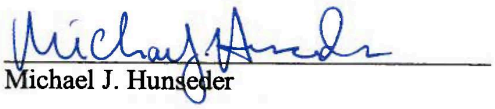
CONCLUSION

In view of the foregoing, AT&T requests that the Commission strike: (a) Mr. Warinner's declaration its entirety, (b) the portions of Mr. Hilton's declaration regarding INS's over-allocation of CWF fiber costs and the dramatic change in Access Division's network costs between 2012 and 2013, and (c) the sections of INS's Final Reply Brief that rely on Mr. Warinner's declaration or the portions of Mr. Hilton's declaration that should be stricken.

---

[14] The only document that Mr. Warinner cites is a belatedly produced spreadsheet (INS. Ex. 80) **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Respectfully submitted,



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Dated: August 31, 2017

Counsel for AT&T Corp.

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I caused a copy of the foregoing Motion to Strike to be served as indicated below to the following:

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Respectfully submitted,

Michael J. Hunseder

EXHIBIT A

PUBLIC VERSION

HIGHLY CONFIDENTIAL - DO NOT RELEASE - NOT FOR INCLUSION IN THE PUBLIC RECORD

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T CORP.,	)	
	)	Docket No. 17-56
Complainant	)	
	)	Bureau ID No. EB-07-MD-001
vs.	)	
	)	
IOWA NETWORK SERVICES, INC., d/b/a AUREON NETWORK SERVICES	)	
	)	
Defendant.	)	

REPLY BRIEF OF IOWA NETWORK SERVICES, INC. d/b/a AUREON NETWORK SERVICES

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August 28, 2017

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T CORP.,	)	
	)	Docket No. 17-56
Complainant	)	
	)	Bureau ID No. EB-07-MD-001
vs.	)	
	)	
IOWA NETWORK SERVICES, INC., d/b/a AUREON NETWORK SERVICES	)	
	)	
Defendant.	)	

REPLY BRIEF OF IOWA NETWORK SERVICES, INC. d/b/a AUREON NETWORK SERVICES

Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), by its undersigned attorneys, and pursuant to the FCC's July 25, 2017 status conference letter ruling and August 14, 2017 Order issued in the above-captioned proceeding, files its Reply Brief.

~~I. AT&T Uses False Cost Allocation Assumptions to Contrive a Lower Rate in its CEA Rate Recalculations.~~

~~AT&T argues that Aureon over-allocated the cable and wire facilities ("CWF") fiber costs to the Access Division because [[BEGIN HIGHLY CONFIDENTIAL]]~~ [redacted]

[redacted]

[1] Second Supplemental Declaration of F. Hilton ¶ 2, attached hereto as Exhibit 77 ("F. Hilton Second Supp. Decl.")

[2] *Id.*

[3] *Id.* ¶ 3.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* ¶ 4.

[redacted]

~~[[END HIGHLY CONFIDENTIAL]]~~

~~II. Aureon Conducted its Cost Studies in Accordance with the FCC's Rules, and Those Studies Show that Aureon Earned Less Than its Authorized Rate of Return.~~

~~AT&T avers that the IXC Division's lease rates used to allocate costs to the Access Division do not match the network cost revenue requirement in INS's tariff filings, and argues that~~

~~10 *Id.* ¶ 5.~~

~~11 *Id.*~~

~~12 *Id.* ¶ 2.~~

~~[[BEGIN HIGHLY CONFIDENTIAL]]~~ [redacted]

[13] ~~AT&T Final Brief at 5-6.~~

[14] ~~[[BEGIN HIGHLY CONFIDENTIAL]]~~ [redacted] ~~[[END HIGHLY CONFIDENTIAL]]~~

[15] ~~Aureon only requested that Mr. Warinner [[BEGIN HIGHLY CONFIDENTIAL]~~ [redacted] ~~[[END HIGHLY CONFIDENTIAL]]~~

[16] ~~Declaration of William Warinner ¶ 4, attached hereto as Exhibit 78.~~

[17] ~~*Id.*~~

[redacted]

[18] *Id.* ¶¶ 6-7.

[19] *Id.* ¶ 7.

[20] *Id.* ¶¶ 7-12.

[21] *Id.* ¶ 12.

[22] *Id.*

[23] Aureon Legal Analysis at 47 (*citing AT&T Corp. v. Alpine Commc'ns, LLC*, Memorandum Opinion and Order, 27 FCC Rcd. 11511 (2012)).

[24] F. Hilton Second Supp. Decl. ¶ 8.

[25] *Id.*

[26] W. Warriner Decl. ¶ 13.

[redacted] ~~[[END HIGHLY CONFIDENTIAL]]~~

III. Aureon's Volume Discount Plan Properly Offered a Reduced CEA Rate to IXCs Agreeing to Minimum Traffic Volume Requirements.

AT&T argues that Aureon's proposed and withdrawn contract tariff applicable to calls directed to eight specified OCNs shows that Aureon's tariffed CEA rate should be lower. The proposed contract tariff terms never went into effect, and the FCC required Aureon to implement a volume discount plan applicable to all CEA traffic, regardless of the destination, for carriers

[27] *Id.*

[28] *Id.*

[29] Aureon Legal Analysis, pp. 38-41.

[30] W. Warinner Decl. ¶ 15.

meeting minimum monthly traffic volume requirements. AT&T misunderstands that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** The Commission required similar cost support when it reviewed AT&T's contract tariffs.[34] It is important to note that that the cost support materials filed in support of the proposed contract tariff did not include uncollectible amounts. Inteliquent was a new CEA customer that was not responsible for the uncollectible amounts, and the prior uncollectible amounts caused by other IXCs, such as AT&T, had already been factored into the tariffed CEA rate. This necessarily resulted in a lower rate for the tariffed volume discount plan than for regular CEA service.

IV. In Order to Reduce Access Stimulation, the FCC Should Enforce its CEA Mandatory Use Policy and Require IXCs to Route all Traffic to Subtending LECs Over the CEA Network.

AT&T avers that bypass of Aureon's network is occurring "on an enormous scale." Aureon only recently learned of this bypass through publicly available documents in litigation, and the FCC has only become aware of the scope of the bypass problem through this case. **[[BEGIN**

[31] F. Hilton Supp. Decl. ¶ 9.

[32] *Id.*

[33] *Id.*

[34] *In re AT&T Communications Revisions to Tariff F.C.C. No. 12*, Memorandum Opinion and Order, 4 FCC Rcd. 811, 813 (1988) (referencing "fully distributed cost information showing a net profit in a representative year").

HIGHLY CONFIDENTIAL]] [redacted] **[[END HIGHLY CONFIDENTIAL]]**

Allowing AT&T to remove its traffic from the CEA network would be a change in the Commission's CEA mandatory use policy that would be detrimental to the public interest. Removing such a large percentage of total CEA traffic from the CEA network would cause a significant increase in the CEA tariff rate for AT&T's competitors; forcing them to abandon rural areas, reducing IXC rural competition and consumer choice, and undermining the future economic viability of the CEA network. Bypass is not the solution, but the cornerstone of access stimulation. The solution to reducing access stimulation is to enforce the CEA mandatory use policy. As

[35] F. Hilton Second Supp. Decl. ¶ 2.

[36] *Id.*

[37] *Id.*

[38] *See* Aureon Exhibit 79.

terminating end office local switching rates have gone to zero, access stimulators have come to depend upon access transport revenue as the only source for access revenue sharing. Conferencing companies, such as Free Conferencing Corporation, have established access transport stimulators, such as HD Tandem, that engage in access transport revenue sharing.[39] *See Inteliquent, Inc. v. Free Conferencing Corp.*, Case No. 16-cv-06976, 2017 W.L. 1196957 *4 (N.D. Ill. 2017).

Enforcing the Commission's CEA mandatory use policy will help eliminate access transport revenue sharing in Iowa, as IXCs route traffic over the CEA network instead of the facilities of access transport stimulators, like HD Tandem. Because Section 61.38 causes Aureon's CEA tariff rate to decrease with increases in traffic volume, there is no ability for Aureon to engage in access transport revenue sharing. LECs have a choice whether to connect to the CEA network, but once they make the decision to become CEA subtending LECs, IXCs should route traffic to those LECs' end offices over the CEA network and not over facilities set up to engage in access transport stimulation.

V. Conclusion

WHEREFORE, for the foregoing reasons, in ruling upon this primary jurisdiction referral, Aureon respectfully requests that the Commission advise the U.S. District Court as requested in Aureon's Answer and Initial Brief, and deny AT&T's Formal Complaint.

Respectfully submitted,

James U. Troup
Tony S. Lee
Keenan P. Adamchak
Fletcher, Heald & Hildreth, PLC

[39] The term "access transport stimulator" refers to an intermediate carrier that is formed for the sole purpose of sharing revenue from transporting access stimulation traffic with conferencing companies and the LECs that terminate that traffic.

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Counsel for Iowa Network Services, Inc.
d/b/a Aureon Network Services

Dated: August 28, 2017

EXHIBIT B

HIGHLY CONFIDENTIAL MATERIALS OMITTED

EXHIBIT C

HIGHLY CONFIDENTIAL MATERIALS OMITTED